IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1703

DURHAM HOSIERY MILLS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

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Petitioner, Durham Hosiery Mills, Inc., by and through its counsel, Haynsworth, Baldwin and Miles, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 2, 1977, in which enforcement of the Order of the National Labor Relations Board which was entered on November 12, 1975 was granted.

OPINIONS BELOW

The decision of the Court of Appeals for the District of Columbia Circuit (No. 75-2176) was reported pursuant to Local Rule 13(*c*) without opinion at 551 F.2d 466. The opinion of the National Labor Relations Board (Board) is reported at 221 NLRB No. 84, 90

LRRM 1544, 1975-76 CCH NLRB ¶16,621. The opinion of the Board is reprinted in the Appendix accompanying this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1977. Petitioner's Motion for Reconsideration of Petitioner's Second Motion to Enlarge Time in which to Petition for Rehearing and Petitioner's Motion to Stay Issuance of Mandate Pending Petition for Certiorari were filed on April 21, 1977 and are still pending. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. §1254(1).

QUESTION PRESENTED

The Petitioner purchased a plant from Danville Industries, Inc. (Danville) and began operations on or about January 2, 1974. On April 4, 1975 Region Five of the Board wrote to the Petitioner requesting that it supply answers to twelve (12) questions concerning the sale of Danville's plant to Petitioner. On the basis of the Petitioner's answers to these questions the General Counsel filed with the Board in Washington, D.C. a Motion for Summary Judgment stating that the Petitioner was a successor employer to Danville and therefore obligated to bargain with the union which had previously been certified as the representative of Danville's employees.

Here Durham attacks as improper the Board's use of the summary judgment procedure in the determination of a factual question crucial to the adjudication of an unfair labor practice; *i.e.*, successorship. Summary judgment, without affording Durham a hearing on the question of successorship, is improper because (1) it is contrary to those procedural safeguards which were affirmed by the Supreme Court in *Golden State Bottling Co.* v. *NLRB, (Golden State)* 414 U.S. 168 (1973), (2) it violates the Petitioner's constitutional right to due process of law and (3) its use will create an administrative hardship by significantly increasing the number of unfair labor practice trials.

The question thus presented is:

> Does Summary Judgment on the factual issue of whether the Petitioner is a successor employer deny the Petitioner its right to due process?

STATUTES AND REGULATIONS

National Labor Relations Act:

Section 8(a)(5) [29 U.S.C. §158(a)(5)]

> "It shall be an unfair labor practice for an employer-(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Board's Rules and Regulations, series 8, as amended:

Section 102.24 (in pertinent part)

> "All motions for summary judgment made prior to hearing shall be filed in writing with the Board pursuant to the provisions of section 102.50."

STATEMENT OF THE CASE

I. Jurisdiction Below

This case was before the Court of Appeals for the District of Columbia Circuit on a Petition for Review

filed by Petitioner seeking review of the Decision and Order of the National Labor Relations Board which issued on November 12, 1975. The Court of Appeals for the District of Columbia Circuit had jurisdiction under § 10(f) of the National Labor Relations Act, as amended, (Act) [29 U.S.C. § 151, *et. seq.*]

II. Background

The Petitioner purchased from Danville a plant located in Danville, Virginia and thereafter began operations on or about January 2, 1974. Prior to this transaction, the Board certified the United Textile Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees of Danville, and subsequently ordered Dan lle to bargain collectively with the Union. This Order was enforced by the United States Court of Appeals for the Fourth Circuit on January 27, 1975.

On April 4, 1975, Region Five of the Board wrote to Petitioner requesting that it supply answers to twelve (12) questions concerning the sale of Danville's plant to the Petitioner. The Petitioner complied with this request by its letter dated May 6, 1975. Thereafter, Petitioner refused to bargain with the Union which had been certified to represent the employees of Danville Industries, Inc., and on June 16, 1975, the Union filed an unfair labor practice charge with the Board's regional office, alleging a violation of Section 8(a)(1) and (5) of the Act.

The Regional Director issued a Complaint and Notice of Hearing alleging that the Petitioner was a successor to Danville. On August 6, 1975, after the Petitioner, through its Answer, denied the allegations contained in the Complaint, the Regional Director, on

August 26, 1975, ordered that the hearing on the unfair labor practice charge be postponed indefinitely. On August 28, 1975, the General Counsel filed with the Board in Washington, D.C., a Motion for Summary Judgment on the successor issue and the proceedings were transferred to the Board. The Board ordered the Petitioner to show cause, on or before September 22, 1975, why the Motion for Summary Judgment should not be granted. In response to this Order, the Petitioner timely submitted a Statement in Opposition to General Counsel's Motion for Summary Judgment, asserting that (1) the Petitioner had at no time participated in or been a party to any of the proceedings which resulted in the Certification and Order that Danville bargain with the Union, (2) the Petitioner had not been given an opportunity in an evidentiary hearing to present evidence which would militate against a finding that the Petitioner was a successor employer to Danville and therefore, (3) the granting of the Motion for Summary Judgment would deny the Petitioner its right to due process under the law.

In its Decision and Order dated November 12, 1975, the Board concluded, on the basis of the Petitioner's answers to those questions presented to it in the Board's letter dated April 4, 1976, that the Petitioner was a successor to Danville and was therefore obligated to bargain with the Union. The Board granted the General Counsel's Motion for Summary Judgment and held that the Petitioner had violated § 8(a)(5) of the Act by refusing to bargain with the Union. The Court of Appeals affirmed the Board's decision on March 2, 1977. It is that decision for which the Petitioner seeks review.

ARGUMENT

I. The Decision of the Court of Appeals for the District of Columbia Circuit Is Contrary to the Decision of the United States Supreme Court in Golden State Bottling Co. v. NLRB Which Affirmed the Right to a Hearing on the Question of Successorship.

The decision of the Court of Appeals for the District of Columbia Circuit is contrary to the decision of the United States Supreme Court in *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168 (1973). In the *Golden State* decision, this Court affirmed those procedural safeguards which the Board *itself* established in *Perma Vinyl Corp.* (*Perma Vinyl*), 164 NLRB 968, 65 LRRM 1168 (1967), *enforced in pertinent part sub. nom. United States Pipe & Foundry Company* v. *NLRB,* 398 F.2d 544 (5th Cir. 1968).

> "The Tie between the offending employer and the bona fide purchaser of the business, supplied by a Board finding of a continuing business enterprise, establishes the requisite relationship or dependence. *Moreover, procedures were announced in Perma Vinyl which provide the necessary procedural safeguards. There will be no adjudication in liability against a bona fide successor 'without affording* [*it*] *a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices.* The successor [will] also be entitled, of course, to be heard against the enforcement of any order issued against it.' 164 NLRB, at 969 (emphasis added).
>
> In this case, All American has no complaint that it was denied due notice and a fair hearing. It was made a party to the supplemental backpay specification proceeding, given notice of the hearing,

> and afforded a full opportunity, with the assistance of counsel, to contest the question of its successorship for purposes of the Act and its knowledge of the pendency of the unfair labor practice litigation at the time of purchase." *Golden State Bottling Co.* v. *NLRB, supra* at 180-181.

In this case, the Board is attempting to circumvent those procedural safeguards which *it* established in the *Perma Vinyl* Decision. In both its Brief and Oral Argument before the Court of Appeals, the Board has ignored the clear language of the *Perma Vinyl* Decision. This Court should not allow the Board and the Court of Appeals for the District of Columbia Circuit to ignore those procedures which the Supreme Court has already affirmed.

II. Summary Judgment on a Material Factual Issue Denies the Petitioner Its Right to Due Process.

In the present case, the question of whether or not the Petitioner is a "successor" to Danville is a critical factual issue in a determination that the Petitioner has an obligation to bargain with the Union. In determining whether or not an employer is a successor, the courts and the Board have taken into consideration the totality of circumstances present in the given case. *NLRB* v. *Boston Needham Industrial Cleaning Co.,* 526 F.2d 74 (1st Cir. 1975); *Lincoln Private Police, Inc.,* 189 NLRB 717, 76 LRRM 1727 (1971). Perhaps in no other area of labor relations law are the particular factual circumstances as crucial as with the law of successorship.

Due process of law demands that where there is a material issue of fact related to a determination as to whether an employer has committed an unfair labor

practice, a hearing must be conducted at some stage of the administrative proceeding before the objecting party's rights can be affected by an enforcement order. *See United States Rubber Co.* v. *NLRB*, 373 F.2d 602 (5th Cir. 1967); *NLRB* v. *Bata Shoe Co.*, 377 F.2d 821 (4th Cir. 1967). To grant summary judgment without an evidentiary hearing is to forever bar the Company's right to judicial review of the crucial factual questions in this unfair labor practice proceeding. *NLRB* v. *Union Brothers, Inc.*, 403 F.2d 883 (4th Cir. 1968).

In the present case the Board has concluded from the admitted facts that the Petitioner is, ipso facto, a successor to Danville and therefore no hearing is required to satisfy the mandates of due process. Drawing this conclusion without a hearing on the question is without legal support. No case relied upon by the Board states that upon the facts as solicited by the Board an employer is *per se* a successor. Indeed, those decisions relied upon by the Board establish that the question of whether an employer is a successor is to be determined upon a consideration of *all* the facts in each case. Although decisions on the determination of successor employers have accorded weight to various factors in deciding whether an employer is a successor, this determination still must be made from the totality of the circumstances and based on the facts in each case. *NLRB* v. *Burns Int'l. Security Services, Inc.*, 406 U.S. 272 (1972).

The issue presented in the unfair labor practice complaint is a factual question as to whether or not the Petitioner is a successor to Danville. This is the precise function which a hearing serves—to determine the facts. Since summary judgment reaches a determination of this factual issue without the benefit of an adversary proceeding where all the facts are developed, its use in this case by the Board and approval by the Court of Appeals was in error. *NLRB* v. *Gebhardt-Vogel Tanning Co.*, 389 F.2d 71 (7th Cir. 1968); *NLRB* v. *KVP Sutherland Paper Co.*, 356 F.2d 671 (6th Cir. 1966).

Every decision relied upon by the Board for its contention that summary judgment is appropriate "arises from" or "is related to" a prior representation proceeding. The Petitioner does not dispute the appropriateness of summary judgment in such cases. The Board has used summary judgment in refusal to bargain cases related to representation proceedings and a number of the circuit courts have found summary judgment appropriate in such cases. *However, the rationale relied upon by the courts in finding summary judgment appropriate in refusal to bargain cases related to representation proceedings does not apply to a case such as this which is in no way related to a prior representation proceeding.*

Based upon the language of the National Labor Relations Act (Act), 29 U.S.C. § 151 *et seq.*, the Board has been granted broad discretion in conducting and overseeing representation proceedings. Section 9(b) of the Act states that "[t]he Board shall decide in each case . . . the unit appropriate." Under this authority the Board provides each party to a representation proceeding with the opportunity for a hearing. Of course, the parties may stipulate to the unit, but in each case an opportunity for a hearing is given. Thus, in refusal to bargain cases such as those cited here, the Board has developed a policy of using summary judgment and not allowing a party to relitigate questions which it has

already had a chance to litigate in a hearing, absent a showing of new or previously unavailable evidence.

Here, the Board has cited *NLRB* v. *Mar Salle Convalescent Home,* 425 F.2d 566 (D.C. Cir. 1970) in support of its contention that summary judgment is proper. However, in *Mar Salle,* it was recognized that summary judgment *is not proper in a case where the responding party has not had ample opportunity to fully litigate all relevant issues.* The Court stated:

> *"While it would not be proper for the Board to grant summary judgment in a case wherein the Respondent had not had ample opportunity to litigate fully all relevant issues,* it would be irresponsible for the Board to waste costly administrative time needlessly when all of the factual issues have previously been resolved." 425 F.2d at 573 (emphasis added).

Here, Durham has had no opportunity for a hearing at any stage of the proceedings. It purchased a plant, received a demand for recognition, answered a letter from the Board asking twelve (12) questions, most of which concerned conditions at the time of sale, and finally, was presented with a demand to show cause or be judged a successor to Danville Industries. Durham has at no time been a party to or participated in any prior representation proceedings and summarily determining that Durham is a successor to Danville violates Durham's right to due process of law.

III. No Court Has Approved the Use of Summary Judgment in Unfair Labor Practice Cases.

The Board has cited no decision wherein a court has approved the use of summary judgment in an unfair labor practice proceeding other than a case which

"arises from" or "is related to" a prior representation proceeding. This case does *not* involve judicial review of a Board decision in a prior representation proceeding. Indeed, the Board has argued that summary judgment is appropriate in this case because it has been used in other instances. To support this, the Board relies on *NLRB* v. *Union Carbide Caribe, Inc.,* 423 F.2d 231, 234-235 (1st Cir. 1970). However, an examination of that Decision reveals that the First Circuit Court of Appeals did *not* consider or rule on the question of whether or not the summary judgment procedure in that case violated the Respondent's right to due process. In *Union Carbide,* the Court dismissed this issue very briefly:

> "The company's second objection to the summary judgment procedure is that it was denied an opportunity to introduce evidence justifying its unilateral wage and benefit increases on grounds that the change was consistent with long-established company practice and was occasioned by legitimate business reasons. *We find it unnecessary to consider these arguments, however, for the company has failed to exhaust its administrative remedies in this regard.*
>
> • • •
>
> A diligent search of the record discloses the fact that the company never raised these arguments before the case reached this court. Moreover, there is no suggestion that any extraordinary circumstances exist which justify the failure. Accordingly, we do not consider these contentions." 423 F.2d at 235.

Clearly, *Union Carbide* does not support the proposition that summary judgment does not violate the Peti-

tioner's right to due process in an unfair labor practice case.

IV. Summary Judgment Procedure in Unfair Labor Practice Proceedings Will Increase the Board's Administrative Burden.

The consequences of the Board's order in this case will be significant. Here, we are not merely concerned with the posting of a notice or reinstatement of an employee with back pay. Instead, an employer has been summarily saddled with a bargaining obligation that in all probability will continue for the life of the Company. In addition, reflecting upon a concern that Justice Rhenquist voiced in his dissent in *NLRB* v. *Burns Int'l. Security Services, Inc.*, 406 U.S. 272 (1972), this procedure may result in burdening the employees with representation by a union which they do not want or choose.

Balanced against these consequences, the Board's administrative inconvenience is comparatively slight. Since 1971, statistics available to the Petitioner indicate that less than one-hundred (100) decisions involving successorship have been published by the Board. The Board has held hearings in those cases and to require it to continue to hold hearings will not increase its administrative duties significantly. On the other hand, if the Board is allowed to use summary judgment in this unfair labor practice case, there is no reason why it could not extend its use to virtually any unfair labor practice case. If the Board's right to summary judgment is upheld in this case, one wonders why an employer would ever cooperate with the Board as Durham did in the investigation of this case! Why should an employer cooperate when in doing so it may be giving

the Board information upon which to base a summary judgment motion which will shift the burden to the employer to come forward or risk having the pleadings accepted as true? See, *NLRB* v. *Gebhardt-Vogel Tanning Co., supra.* Over the past fifteen (15) years, over one-half (½) of all meritorious charges were settled prior to the issuance of a complaint and hearing. A mass refusal by employers to cooperate with the Board could result in a tremendous increase in the number of cases which go to trial and thereby increase the present administrative duties of the Board.

CONCLUSION

For the reasons set forth above, The Petition for Certiorari should be granted.

Dated this the 31st day of May, 1977.

Respectfully submitted,

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APPENDIX

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APPENDIX

Argued: February 24, 1977 Decided: March 2, 1977

Before Robinson, Tamm and Robb, *Circuit Judges.*

James M. Miles, G. Thomas Harper, (Haynsworth, Baldwin and Miles on brief) for Petitioner; John D. Burgoyne, Corina L. Metcalf, Attorneys, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board on brief) for Respondent.

Per Curiam:

This cause came on for consideration on a petition for review and a cross-application for enforcement of an order of the National Labor Relations Board and was argued by counsel. On consideration of the foregoing, it is

Ordered and Adjudged by this Court that the order of the National Labor Relations Board on review herein is hereby affirmed, on the basis of the findings of fact and conclusions of law incorporated in the Board's order of November 12, 1975.

Enforcement Granted

Decision and Order

Upon a charge filed on June 16, 1975, by United Textile Workers of America, AFL-CIO, herein called the Union, and duly served on Durham Hosiery Mills, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on August 6, 1975, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 1, 1972, following a Board election in Case 5—RC—8454 the Union was duly certified as the exclusive collective-bargaining representative of the employees of Danville Industries, Inc., hereafter Danville, in the unit found appropriate.

The complaint further alleges that on April 29, 1974, the Board issued a Decision and Order [1] finding that Danville had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and ordering that it commence to bargain therewith, and that on January 27, 1975, the United States Court of Appeals for the Fourth Circuit issued its decision *per curiam* enforcing the Board's Order in full.[2]

The complaint alleges that since January 2, 1974, Respondent has been the successor of Danville and had knowledge of the Union's certification and Danville's obligation to bargain therewith, but since June 24, 1975, Respondent

[1] 210 NLRB. 307 (1974).

[2] 510 F.2d 968.

has refused and continues to refuse to bargain as successor to Danville although the Union is requesting and has requested it to do so.

On August 15, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and requesting that the complaint be dismissed in its entirety for failure to state a cause of action. Respondent admits, *inter alia*, the Union's certification as bargaining representative of all Danville employees in the appropriate unit, that it purchased the assets of Danville at its Danville, Virginia, location and continued the manufacture of products which had previously been manufactured by Danville at this location, and that it has refused to bargain with the Union upon request. It denies, however, that it is a successor to Danville.

On August 28, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment, together with exhibits. He submits, in effect, that, by virtue of Respondent's admissions and the evidence he attaches, as a matter of law, the Respondent has violated Section 8(a)(5) and (1) of the Act. Subsequently, on September 8, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed, in response to Notice To Show Cause, a statement in opposition to the General Counsel's Motion for Summary Judgment and an amended statement, submitting that, inasmuch as it was not a party in the representation case or the previous 8(a)(5) proceeding involving Danville, and successorship was not litigated therein, it is not attempting to relitigate an issue litigated in the prior representation case. Although conceding the accuracy of the facts alleged in the complaint and in the General Counsel's motion, it asserts however that these facts are insufficient to establish successorship and that due process requires an evidentiary

hearing in which Respondent may present evidence militating against a finding of successorship herein.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

As indicated above, Respondent stipulates that the facts alleged in the Motion for Summary Judgment are accurate and do not materially vary from those alleged in paragraph 6 of the complaint, but asserts that these facts are insufficient to establish successorship and that a hearing is required on this issue.[3]

The facts alleged by the General Counsel, both in his motion and in paragraph 6 of the complaint, in support of the conclusion of successorship, are as follows: Respondent has continued the operations of Danville at the same location, utilizing the same equipment and producing the same job functions under the same supervision.[4]

From these admitted facts, the conclusion clearly follows that Respondent is the successor to Danville,[5] and, in view

[3] The Respondent is not seeking to relitigate the issues in Case 5—RC—8454 in which it was not a party and in which the Union admittedly was certified as the exclusive bargaining representative of the Danville employees in the appropriate unit.

[4] In a statement by Respondent which the General Counsel attaches as an exhibit to his motion, Respondent states, *inter alia*, that there was no hiatus in the operation upon the transfer of ownership, and that it was aware of the Union's certification as the exclusive representative of the employees in the appropriate unit. Respondent does not now controvert this statement.

[5] *N.L.R.B.* v. *Burns Security Services, Inc.*, 406 U.S. 272, 279

of these facts standing admitted, no hearing is required to satisfy the mandates of due process. It is well settled that a successor employer is obligated to bargain, upon request, with the exclusive representative of the employees of its predecessor, where, as here, it retains all of the employees in the unit and continues the same operation, and that a refusal to do so violates Section 8(a)(5) of the Act.[6]

Accordingly, we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. *The Business of the Respondent*

Respondent Durham Hosiery Mills, Inc., is a North Carolina corporation with a facility located in Danville, Virginia, which is the only facility involved herein, where it is engaged in the manufacture of knitted goods. During the past 12 months, a representative period, Respondent has sold and shipped products in interstate commerce valued in excess of $50,000 to customers located outside the Commonwealth of Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

(1972); *Howard Johnson Company*, 198 NLRB No. 98 (1972); *Ranch-Way, Inc.*, 203 NLRB 911 (1973).

[6] *Howard Johnson Company, supra*, fn. 5.

II. *The Labor Organization Involved*

United Textile Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its Danville, Virginia, location, excluding professional employees, office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On May 3, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 5, designated the Union as their representative for the purpose of collective bargaining. The Union was certified as the collective-bargaining representative of the employees in said unit on November 1, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *Respondent's Successorship to Danville Industries, Inc.*

Thereafter, on January 2, 1974, Danville Industries, Inc., sold its Danville Knitting Mills Division to Respondent herein. Respondent purchased all assets, including real property, production facilities, and inventory, and continued at the same location where it produced the same products for the same customers as had Danville Industries, Inc. In so doing, Respondent utilized the same unit employees under the same supervisory personnel.

C. *The Request To Bargain and Respondent's Refusal*

Commencing on or about June 24, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 24, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collecting bargaining of all employees in said unit.

Accordingly, we find that the Respondent is the successor to Danville and has, since June 24, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collec-

tively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company* 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Durham Hosiery Mills, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Textile Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its Danville, Virginia, location, excluding professional employees, office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 1, 1973, the above-named labor organization has been and now is the certified exclusive repre-

sentative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since January 2, 1974, Respondent has been and is the successor to Danville Industries, Inc.

6. By refusing on or about June 24, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Durham Hosiery Mills, Inc., Danville, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Textile Workers of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed by the Employer at its Danville, Virginia, location, excluding professional employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Danville, Virginia, facility copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[1] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington D.C.

Betty Southard Murphy, Chairman
Howard Jenkins, Jr., Member
John A. Penello, Member
National Labor Relations Board

No. 76-1703

In the Supreme Court of the United States

OCTOBER TERM, 1977

DURHAM HOSIERY MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The *per curiam* decision of the court of appeals (Pet. App. 1a) is reported at 551 F. 2d 466. The Board's decision and order (Pet. App. 2a-11a) are reported at 221 NLRB 600.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 2, 1977. The petition for a writ of certiorari was filed on May 31, 1977.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On June 21, 1977, the court of appeals denied petitioner's petition for rehearing *en banc*. On July 12, 1977 the Chief Justice denied petitioner's application for a stay of mandate pending disposition of the petition for certiorari.

QUESTION PRESENTED

Whether the Board was required to hold an evidentiary hearing where petitioner did not controvert the facts alleged by the General Counsel, and these facts were legally sufficient to establish that petitioner was a successor employer, who had acquired the predecessor's business with knowledge that the union was the duly certified collective bargaining representative of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

Danville Industries, Inc. ("Danville") is a Virginia corporation whose Danville Knitting Mills Division was engaged in the manufacture of knit goods at its Danville, Virginia plant (A. 13).[2] In May 1973, the Board conducted a secret ballot election at the Danville plant, resulting in the certification, on November 1, 1973, of the United Textile Workers of America, AFL-CIO ("the Union") as the collective bargaining representative of the production and maintenance employees (A. 14-15).[3]

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[2]"A." references are to the appendix to the briefs below; a copy has been lodged with the Clerk of this Court.

[3]Danville thereafter refused to bargain with the Union, which filed charges against Danville. On April 29, 1974, the Board, granting the General Counsel's motion for summary judgment, held that Danville had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union. *Danville Industries, Inc.*, 210 NLRB 307. On January 27, 1975, the Court of Appeals for the Fourth Circuit enforced the Board's order. *National Labor Relations Board* v. *Danville Industries, Inc.*, 510 F. 2d 966 (A. 10-20, 21-23).

On September 20, 1973, shortly before the Board certified the Union, petitioner Durham began negotiations for the purchase of Danville Knitting Mills. A tentative agreement was reached on October 27, 1973, and a final agreement on January 2, 1974 (Pet. App. 6a; A. 32). On April 4, 1975, after learning of the sale, the Board's Regional Office wrote to counsel for Durham requesting information on the details of the sale (A. 29-30). By letter of May 6, 1975, Durham replied that it had purchased all of the assets of Danville, had rehired all of the approximately 223 employees employed by Danville, and had retained the same supervisory personnel; that there was no hiatus in operation of the plant, and all customers of Danville had been retained; and that, at the time of the purchase, Durham was aware of the Union's certification (A. 31-33).

On May 19, 1975, the Union sent Durham a letter requesting an immediate bargaining meeting (A. 24). When no reply was received, the Union filed an unfair labor practice charge with the Board against Durham (A. 28). Thereafter, the Union sent Durham a second letter, which again went unanswered (A. 2, 26). Durham, however, advised the Board that it was refusing to recognize the Union, but denied that it had violated the Act (A. 3, 34).

On August 6, 1975, the Board's Regional Director issued a complaint alleging that Durham was Danville's successor, and that it had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union since June 24, 1975 (A. 35-38). Durham filed an answer, admitting, *inter alia*, the Union's certification as bargaining representative of the Danville employees and its purchase of the Danville facility (A. 40-41). Counsel for the General Counsel then filed a Motion for Summary Judgment with the Board, setting forth the sequence of events leading to Durham's refusal to bargain and also the details of Durham's purchase and takeover of the Danville facility, as

detailed in Durham's letter of May 6, 1975, a copy of which was attached to the Motion (A. 1-4). Durham, in an Amended Statement in Opposition to General Counsel's Motion for Summary Judgment, "stipulate[d] that the facts as alleged in the Motion for Summary Judgment are accurate," but contended that these facts "do not support the legal conclusion * * * that [the] Employer is a successor Employer," and that due process required an evidentiary hearing (A. 48-49).

The Board found that it was uncontroverted that Durham had continued, without interruption, the operations of Danville at the same location, utilizing the same work force under the same supervision, and that Durham was aware of the Union's certification at the time of the sale. The Board concluded that these admitted facts were sufficient to establish that petitioner was a successor employer and thus obligated to bargain, upon request, with the representative of the predecessor's employees. Accordingly, an evidentiary hearing was not required. The Board therefore granted the Motion for Summary Judgment, holding that Durham violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain (Pet. App. 4a-5a). The Board entered a bargaining order (Pet. App. 9a-11a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a).

ARGUMENT

In *National Labor Relations Board* v. *Burns International Security Services*, 406 U.S. 272, 278, 281, this Court held that a new employer is a successor employer bound by its predecessor's bargaining obligation where the bargaining unit continued to be "an appropriate one," a majority of the employees hired by the new employer were represented by a recently certified union, and the new employer "could not reasonably have entertained a good-faith doubt" of

that majority status. On the basis of information originally supplied by Durham, the Board found that all the above indicia of successorship were met here. Petitioner does not challenge the facts underlying the Board's conclusion, but contends that the Board's order nonetheless should not be enforced because the Board's failure to accord it an evidentiary hearing on the successorship question constituted a denial of due process. There is no substance to this contention.

"An essential prerequisite to the right to a hearing is something to be heard." *National Labor Relations Board* v. *Carolina Natural Gas Corporation*, 386 F. 2d 571, 574 (C.A. 4). "If there is nothing to hear, then a hearing is a senseless and useless formality." *National Labor Relations Board* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (C.A. 5). Here, since there was no dispute as to the underlying facts concerning Durham's status as a successor employer, an evidentiary hearing would have been "a senseless and useless formality." Nor was the Board's procedure unauthorized by its rules. Those rules "provide adequate authority for the Board's transfer of proceedings to itself." *National Labor Relations Board* v. *Union Brothers, Inc.*, 403 F. 2d 883, 888 (C.A. 4). See 29 C.F.R. 102.50.[4]

Golden State Bottling Co. v. *National Labor Relations Board*, 414 U.S. 168 (Pet. 6-7), does not hold otherwise. The Court's reference to a hearing "to present evidence

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[4]The procedure followed by the Board in this case is consistent with that permitted by the Federal Rules of Civil Procedure. Rule 56(e), Fed. R. Civ. P., provides that, "[w]hen a motion for summary judgment is made and supported * * *, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices" (414 U.S. at 180) contemplates a situation where there is a question of fact concerning the question of successorship. There is no such question here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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